

Your Options In Negotiating Severance

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As the number of layoffs has risen, the willingness of companies to negotiate the contents of severance packages has fallen off due to fears of creating inequalities among classes of employees and the necessity to hoard cash.

“Given the exigencies everyone faces, what companies feel they’re able to give and what employees are getting are different now from what one would have seen last year,” says an experienced employment attorney who represents large corporations. “It’s not that employers are less inclined to be kind, they’re just less able.”

Federal laws governing severance also come into play, says **Jeffrey Liddle**, managing partner of law firm **Liddle & Robinson** in New York. “A lot of employers are fearful to negotiate with an individual because there is at least some arguable justification that under (federal laws) what is actually paid to one individual must be then paid to another similarly situated individual,” he says.

Worth Exploring

Despite the difficulty of getting a soon-to-be-former employer to part with additional cash, there are items that can, and should, be part of severance negotiations, says **Robert Benowitz**, a partner at **Rick, Steiner, Fell & Benowitz, LLP** in New York, who’s represented a number of managing directors in recent months.

Start by protecting your most important asset - client relationships. “We’ve been successful in negotiating certain types of carve-outs from non-competes that related to clients a managing director was working with extensively,” he says. “You don’t necessarily have to go to the beach during the severance period.”

Regardless of what your severance agreement says, many states take a jaundiced view of non-competes, adds **Diane Pfadenhauer**, an employment attorney and principal consultant at **Employment Practice Advisors** of Northport, N.Y. “For example, California disallows them, so if you’re given a release that has a non-compete provision, take it to an attorney - not your friend the real estate lawyer, an employment attorney,” she advises. “You don’t want to restrict your right to work, but if the non-compete portion is unenforceable, do you want to wage that battle with an employer with deep pockets?”

A Helping of Leftovers

If your employer is downsizing greatly, it can’t hurt to ask for any leftover equipment. “If you have a company laptop, ask for it,” Pfadenhauer says. “If you have a cell phone, ask for that. Just make sure that you do give things back if the employer says no, because you can’t hold things hostage to get your last paycheck.”

References are another area that’s important to talk about. “You need to know what the company will say in a reference, or get someone from outside Human Resources to provide a reference,” Pfadenhauer suggests. If your company has a no-references policy, it likely only covers current employees, she says, so once your boss moves on, he can provide references again.

Next, make sure you cover your personal assets by asking for reciprocal indemnification from any claims that could arise from your actions during employment. “You could be getting millions in severance but in one lawsuit it could go down the drain if you’re not indemnified,” Benowitz points out. “You also want them to agree to advance legal fees if any claims arise.”

Minimizing Risk to You

He can easily rattle off situations in which a laid-off investment banker could be at risk: The **Securities and Exchange Commission** launches an investigation and you're called as a witness, or you've hired or supervised people in the past and there's an allegation of sex or age discrimination.

If you happen to be the one discriminated against, that creates a situation in which you probably can negotiate for better severance. Benowitz is representing a senior investment banker who was head of a department. The company brought in a co-head who was in his thirties, then did a forced reduction and terminated the more senior officer. "That gave grounds to a claim of age discrimination and we were retained to write a demand letter," he says.

Liddle warns that winning a lawsuit over severance discrimination can be tough because disputes are typically resolved in arbitration or pre-arbitration mediation, so the results do not become part of the public record unless the employee was among the top five compensated employees, whose pay is listed in SEC 8-K filings.

When considering a lawsuit, it's important to have context on your side. "One of the things I see every day is people who were substantial producers, who were in no way connected with or responsible for the credit crunch, who generated hundreds of millions in revenues getting close to zero bonuses or severance pay packages that are one year of base comp," Liddle says. "If you're in that situation, get your case filed and get on line because you're going to have a much better chance of getting an overall settlement that would in all likelihood be multiples of what you were originally offered."

Retaining an employment lawyer will cost around \$2,500 Benowitz says. "It's a small investment to see if you can get a lot more," Benowitz says.